BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JENNIFER MCGEOGH	)	
Claimant	)	
	)	
VS.	)	
	)	
BELTMANN INTEGRATED LOGISTICS, INC.	)	
COMMERCIAL INSTALLERS, LLC	)	
Respondent	)	Docket No. 1,043,140
	)	
AND	)	
	)	
UNKNOWN	)	
Insurance Carrier	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the April 29, 2009 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery (ALJ).

ISSUES

The ALJ concluded that although claimant was injured while working and gave notice of her accident, she failed to establish that an employer/employee relationship existed between herself and the entities identified above as the respondent.[1] He also found that she failed to file a timely written claim. Thus, her claim for compensation was denied.

The claimant requests review of this decision and urges the Board to reverse the ALJ's Order. Claimant maintains her evidence establishes an employment relationship between herself and Commercial Installers, Inc. or Beltmann Integrated Logistics, Inc. on December 8, 2006. Claimant further argues that she attempted to give her prescription pill

[1] The Application for Hearing lists two potential employers: Commercial Installers, LLC and Beltmann Integrated Logistics, Inc. The ALJ's Order only identified one of the entities and failed to include the Kansas Workers Compensation Fund.

bottles to Andrew Ostrowski, who she contends owns or works for one or both of the respondents identified in the Application for Hearing. Thus, she maintains that act satisfies the written claim requirement set forth in K.S.A. 44-520a.

Neither respondent appeared at the preliminary hearing, nor have they filed a brief with the Board.

The Fund argues that the ALJ should be affirmed in all respects as the claimant failed to establish an employment relationship or a timely written claim. The Fund also contends claimant was an independent contractor and, thus, the Act does not apply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

There is no dispute that claimant was injured while working as an electrician on December 8, 2006. But who she was working for at the time of her accident is seriously in dispute. Claimant was the only individual to testify in this matter and unfortunately, her testimony is less than clear with respect to the crucial issue of employment.

Claimant is a licensed electrician engaged in a partnership with another individual, Derman Brown. The two work under the name of Metro Maintenance. Mr. Brown is acquainted with Andrew Ostrowski, an individual who, according to claimant, does business under a number of different names including Commercial Installers, LLC, Beltmann Integrated Logistics, Inc., and Ostrowski Commercial Installers, LLC.

According to claimant, Mr. Ostrowski offered Mr. Brown and claimant an opportunity to "make some money out of town".[2] While no written agreement was entered into, claimant and Mr. Brown traveled to the construction site for a new Wal-Mart in Topeka, Kansas from Michigan. Claimant was to be paid $700 per week, a flat rate regardless of the time involved. No taxes were taken out of these payments and claimant was paid in cash, at least at those times when she actually received payment from Mr. Ostrowski. According to claimant, she and Mr. Brown worked off the construction plans and other than the more expensive tools, which were provided by Mr. Ostrowski, she used her own tools and performed the work as she was taught, independent of any input from Mr. Ostrowski.

Claimant continuously performed electrical work on the project until December 8, 2006 when another worker ran over her leg with a "high-low" vehicle. She was seriously injured and immediately taken to the hospital. Although claimant identified "Wal-Mart" as her employer to the hospital, claimant admits she was in pain and inaccurate.

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[2] P.H. Trans. at 8.

Claimant never returned to work and she returned to her home in Michigan. On December 15, 2006 Mr. Ostrowski came to see Mr. Brown and claimant tried to hand him her prescription bottle in an effort to get him to pay her medical bills. Mr. Ostrowski refused. She admits she never gave him any documentation regarding her injury - only that she attempted to hand him the pill bottle.[3]

The ALJ entered an Order denying claimant's claim for benefits. He specifically found that:

> Claimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and in the course of employment. Notice was timely. Written claim was not timely. The parties are covered by the Workers Compensation Act. The relationship of employer and employee didn't exist between claimant and respondent on the date or dates of the accident.[4]

The ALJ's Order is somewhat unclear in that it does not state with specificity the basis of his ruling. He either found that although claimant was injured while working, she failed to prove that her injury arose out of an employment relationship with the respondent(s) she identified in the Application for Hearing, or that she was an independent contractor, and thus not an employee. But he also found that the parties are covered by the Workers Compensation Act.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

Claimant's testimony is, at best, vague as to the employment relationship and identity of her employer. The E-1 identified two entities but throughout her testimony, she went on to identify additional entities who may or may not be the employer, including, Ostrowski Commercial Installers, LLC, and Commercial Installers Beltmann. At one point she conceded that she wasn't sure who she was working for at the time of her accident.[7] It is equally unclear what, if any, role Mr. Ostrowski might play in any of these businesses, if they even exist. She suggested that she worked independently as an electrician, reading

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[3] *Id.* at 64.

[4] ALJ Order (Apr. 29, 2009).

[5] K.S.A. 2006 Supp. 44-501(a).

[6] K.S.A. 2006 Supp. 44-508(g).

[7] P.H. Trans. at 42.

the plans and making her own decisions about the work, but then testified that Mr. Ostrowski provided some of the more expensive tools and told them where to work. She was paid a flat rate regardless of the time involved and she says that Mr. Ostrowski gave her a shirt with the name "Beltmann" on it to wear while working.

After reviewing the entire record, this Board Member finds that the ALJ's Order should be affirmed. Simply put, the claimant has failed to meet her evidentiary burden of establishing an employment relationship existed between herself and any of the entities identified in the Application for Hearing. Claimant may or may not have been an independent contractor or she may have been an employee of one of the many entities she identified in her testimony. Unfortunately, the evidence fails to persuade this Board Member that the threshold issue, an employment relationship, existed.

Independent of the employment relationship issue, the ALJ found that claimant failed to satisfy the timely written claim requirements. K.S.A. 44-520a(a) provides for written claim to be served within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workmen's compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced before the director within one (1) year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

Here, claimant's date of accident was December 8, 2006. Her Application for Hearing (E-1) was filed on November 9, 2008. Claimant concedes that the November 9, 2008 filing is the only formal writing that could be construed as a written claim. However, she argues that the act of presenting her prescription bottle (for medications given to her after her accident) to Andrew Ostrowski in December 2006 satisfied the written claim statute.

This Board Member finds the ALJ's conclusion that claimant failed to satisfy the written claim statute should be affirmed. The act of presenting a pill bottle, standing alone, is insufficient to meet the statutory criteria contained in K.S.A. 44-520a.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 29, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

_____
JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant

Darin M. Conklin, Attorney for the Fund

Brad E. Avery, Administrative Law Judge

Beltman Integrated Logistics, Inc., Respondent,
Commercial Installers, LLC, Respondent
1019 Beaconfield St.
Grosse Point, Michigan 48230

[8] K.S.A. 44-534a.